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TESTAMENTARY RESTRICTIONS ON MARRIAGE: A REEXAMINATION OF *IN RE ESTATE OF FEINBERG* IN LIGHT OF *OBERGEFELL V. HODGES*

CHRISTIAN POPPE

I. INTRODUCTION

What happens when the right to marriage and testamentary freedom are placed at odds because a testator's will seeks to restrict the marriage rights of the living? This question has been raised and addressed in several cases and has recently been found in favor of the testator's intent.

One such case is *In re Estate of Feinberg*,[1] which is a particularly interesting example of the issue because the Illinois Appellate Court and Illinois Supreme Court each fundamentally disagreed with the other's holding to the extent that the two courts seemed to be following entirely different rules of law. This paper seeks to analyze those juxtaposed opinions and argues that the appellate court got it right. This paper will first outline the fundamental right of testamentary freedom and how this generally allows for testators to impose restrictions upon the living by conditioning inheritance upon compliance. Next, that presumption of testamentary freedom will be exemplified looking at the facts and the Illinois Supreme Court's holding in *Feinberg*. This paper then explains how marriage restrictions in wills are generally held invalid because they go against public policy, and then shows how that presumption was employed by the Illinois Appellate Court's decision in *Feinberg*. Next, an outline of the liberty-based constitutional and legal philosophy employed by the Illinois Appellate Court is provided as well as case law analysis showing how it has subsequently been applied and affirmed in the legal realm of marriage. The paper concludes by arguing that the appellate court's decision in *Feinberg* was correct in light of these developments because the restrictions were against the strong public policy favoring individual's right to choose their partner in marriage.

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[1] *In re* Estate of Feinberg, 235 Ill. 2d 256 (2009).

II. TESTAMENTARY FREEDOM

It is first important to look into the background right of testamentary freedom in order to outline the general permissibility landscape of restrictive clauses in testation. Broadly, the right of testation allows a decedent to freely govern the disposition of their property from the grave. This right to testation, "to one's family in particular—has been part of the Anglo-American legal system since feudal times."[2] According to Blackstone, there are "no traces or memorials of any time when [testation] did not exist."[3] Thus, the right to free testation has existed in western law since before the Statute of Wills was passed in 1540, which expressly allowed testators to leave land upon death.[4]

This history of testation has developed into what is now known as America's "love of free testation,"[5] which has been described as a "jealously guarded right"[6] unparalleled throughout the western world.[7] America's testation is unparalleled due to its peculiarly broad scope.[8] For example, in the United States it is a basic rule that a parent may disinherit minor children for any or no reason.[9] This broad scope is uniformly recognized by nearly all state courts,[10] and is usually justified on grounds ranging from raw American individualism to incentivizing work, savings, and maximizing wealth.[11] Regardless of justification, freedom of disposition is inarguably engrained in

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[2] Hodel v. Irving, 481 U.S. 704, 716 (1987).

[3] 2 WILLIAM BLACKSTONE, COMMENTARIES 259 (1893).

[4] Statute of Wills 1540, 32 Hen. 8, c. 1 (Eng. and Wales).

[5] Roland Chester, *Disinheritance and the American Child and Alternative from British Columbia*, UTAH L. REV. 1, 32 (1998).

[6] Am. Comm. For Weizmann Inst. Of Sci. v. Dunn, 883 N.E.2d 996, 1002 (N.Y. 2008).

[7] Ronald J. Scalise Jr*., Public Policy and Antisocial Testators,* 32 CARDOZO L. REV. 1315, 1325-26 (2011).

[8] JENS BECKERT, INHERITED WEALTH 71 (Thomas Dunlap trans., 2008) (compared to France and Germany, the United States "without question, [has] the broadest degree of testamentary freedom").

[9] Joshua C. Tate, *Caregiving and the Case for Testamentary Freedom*, 42 U.C. DAVIS L. REV. 129, 137 (2008) ("Tate Freedom") (noting that in "every American state except Louisiana, however, a child or other descendant alive at the time of the will's execution and expressly disinherited in the will has no claim to receive a share of the estate").

[10] *Id*. at 157.

[11] HENRY DE BRACTON, 2 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 181 (George E. Woodbine ed., Samuel E. Throne trans., 2nd ed., The Selden Soc'y, 1968) ("[A] citizen could scarcely be found who would undertake a great enterprise in his lifetime if, at his death, he was compelled against his will to leave his estate to ignorant and extravagant children and undeserving wives").

American law. Thus, the United States' engrained veneration for testation has resulted in wide-spread jurisprudential gravity in favor of testamentary freedom.

III. GENERAL TESTAMENTARY RESTRICTIONS

This reverence of free testation has largely led American courts to permit testamentary controls or restrictions on potential beneficiaries.[12] As a general rule, testamentary conditions are upheld by courts so long as they are reasonably definite in time or scope and not contrary to public policy, which usually entails conditions of illegality.[13] Indeed, despite the First Amendment, even religious restrictions on the living imposed in testation have rarely been prohibited, and courts prefer to strictly construe such clauses rather than invalidate them.[14] Overall, American jurisprudence is extremely accepting of restrictive covenants in testation and has allowed religious restriction provisions.

IV. *IN RE ESTATE OF FEINBERG*

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[12] Scalise Jr., *supra* note 7, at 1327. However, general exceptions do exist. First, all jurisdictions allow a spouse a right to an elective share. *See* Unif. Probate Code §§ 2-201 to 2-214 (1990) (amended 2008). Second, defensive doctrines such as undue influence are used to set aside a testamentary disposition where the beneficiary substituted the testator's volition with their own desires. *See* Tate Freedom, *supra* note 9 at 143(Undue influence in turn applies to bequests in favor of children or unrelated parties, but in practice courts tend to apply the doctrine solely when the beneficiary is not related to the testator, as courts usually consider estates left to relatives to be "natural" and therefore will not overturn them); Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 243-44. Third, a testator's mental capacity has been used to invalidate wills. *See, e.g.*, *In re* Strittmater's Estate, 53 A.2d 205 (N.J. 1947) (invalidating testamentary gift to women's rights organization because testator suffered from insane delusion that men were evil). Fourth, the doctrines of fraud and duress are employed when factually appropriate to undue testamentary dispositions that appear unlawful. *See, e.g.*, Puckett v. Krida, 1994 Tenn. App. LEXIS 502 (1994) (invalidating bequest made in favor of nurses who cared for testator on grounds of fraud); Latham v. Father Divine, 85 N.E.2d 168 (N.Y. 1949) (allowing complaint on theory that the bequest to a religious organization was procured by duress).

[13] Scalise Jr., *supra* note 7, at 1327. (stating "[i]f a testator were to condition receipt of a legacy upon the legatee committing theft or murder, rules of public policy would intervene and invalidate such a disposition. Because theft and murder are illegal, encouraging such illicit activities is no more allowable than the underlying activity itself. The mere fact that the right of testation is important does not mean that it is unlimited and absolute").

[14] Scalise, Jr., *supra* note 7, at 1331.

This reverence of free testation is exemplified by the Illinois Supreme Court's holding in the case of *In re Estate of Feinberg*.[15] There, the Illinois courts faced a crossroads public policy question concerning the right to testation, the right to religion, and the individual right to marriage. The dispute involved the two surviving children and five grandchildren of the wealthy couple Max and Erla Feinberg. Upon his death, Max left a sizable will and trust which, among several tax-motivated provisions, provided his surviving spouse with a limited testamentary power of appointment over the distribution of his trusts and assets.[16] Erla later exercised that power and directed that, upon her death, each of the two children and any of her grandchildren not deemed deceased under Max's beneficiary restriction clause were to receive $250,000.[17]

This beneficiary restriction clause is where the case got dicey. It stated that any descendant who married outside the Jewish faith or whose non-Jewish spouse did not convert to Judaism within one year of marriage would be "deemed deceased for all purposes of th[e] instrument as of the date of such marriage" and that descendant's share of the trust would revert to the children.[18] At the time of Erla's death in 2003, all five grandchildren had been married for over a year; however only one met the marriage condition of the beneficiary restriction clause and was entitled to receive the $250,000 inheritance. Lengthy litigation followed, pitting family members against one another arguing whether the party-named "Jewish Clause" was a valid provision of the will or whether it was invalid on the grounds of public policy.[19] The specific question addressed was whether the holder of a power

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[15] *Feinberg,* 235 Ill. 2d. at 256.

[16] *Id.*at 259.

[17] *Id.*at 260.

[18] *Id.*at 261.

[19] *Id.;* Public policy (16c) 1. The collective rules, principles, or approaches to problems that affect the commonwealth or (esp.) promote the general good; specif., principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole of society <against public policy>. Courts sometimes use the term to justify their decisions, as when declaring a contract void because it is "contrary to public policy." — Also termed *policy of the law. Public Policy*, BLACK'S LAW DICTIONARY (11th ed. 2019). *See also* WILLIAM REYNELL ANSON, PRINCIPLES OF THE LAW OF CONTRACT 286 (Arthur L. Corbin ed., 3d Am. Ed. 1919) ("Whatever may have been its origin, [public policy] was applied very frequently, and not always with the happiest results, during the latter part of the eighteenth and the commencement of the nineteenth century. Modern decisions, however, while maintaining the duty of the courts to consider the public advantage,

of appointment over the assets of a trust may, without violating public policy, direct assets to be distributed to living descendants while deeming descendants who married outside the holder of power's religious tradition deceased for the purpose of apportionment.[20]

V. ILLINOIS SUPREME COURT HOLDING IN *FEINBERG*

The Illinois Supreme Court overturned the appellate court and upheld the provision as valid.[21] Specifically, the court held that Illinois statutes reveal a public policy in support of extremely broad testamentary freedom.[22] The holding was reasoned by countering several groundings of the appellate court's ruling that the clause violated public policy because it invalidly discouraged marriage or encouraged divorce.[23] First, the court distinguished three cases[24] cited by the appellate court, arguing the

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have tended more and more to limit the sphere within which this duty may be exercised").

[20] *Feinberg*, 235 Ill. 2d at 262. The Illinois Supreme Court narrowed the question to this, instead of the validity of Max's estate as a whole, because doing so avoided questions of continued restrictions – such as an unmarried grandson who would have begun to receive distributions under the plan but may have them forfeited if he married a non-Jewish woman who did not convert within one year.

[21] *Id.* at 286.

[22] *Id.* at 267-69 (finding "the public policy of the state of Illinois" is "one of broad testamentary freedom, constrained only by the rights granted to a surviving spouse and the need to expressly disinherit a child bord after execution of the will if that is the testator's desire") (citing Harris Trust & Savings Bank v. Donovan, 145 Ill. 2d. 166 (1991)) ("The first principle purpose in construing a trust is to discover the settlor's intent from the trust as a whole, which the court will effectuate if it is not contrary to public policy"); *see also*, Harris & Savings Bank v. Beach, 118 Ill. 2d 1 (1987) ("In construing either a trust or a will the challenge is to find the settlor's or testator's intent and, provided that the intention is not against public policy, to give it effect").

[23] *In re* Estate of Feinberg, 383 Ill. App. 3d 992 (2008).

[24] Ransdell v. Boston, 50 N.E. 111 (Ill. 1898) (establishing general rule that testamentary provisions restraining marriage or encouraging divorce are void as against public policy, but upholding the provision giving testator's son a life estate because the provision fell under the exception to the general rule that the testator's purpose was "simply to secure the gift to his son in the manner which, in his judgment, would render it of the greatest benefit to him, in view of the relations then existing between him and his wife." This was distinguished by the *Feinberg* appellate court as a narrow exception where divorce is pending. The supreme court read it more broadly as allowing certain facts and circumstances to provide for support in the event of divorce or death); Winterland v. Winterland, 59 N.E.2d 662 (Ill. 1945) (invalidating provision where a father directed his son's share be held in a trust "until

circumstances of those cases were inapposite because Feinberg's will did not involve a provision "capable of exerting a disruptive influence upon an otherwise normally harmonious marriage by causing the beneficiary to choose between his or her spouse and the distribution."[25] Second, the court cited precedent[26] that held conditions subsequent, precedent, or limitations may be placed on marriage so long as they do not impose perpetual celibacy upon the descendant.[27] Third, the Illinois Supreme Court explicitly rejected applying the progressive approach of the Restatement (Third) of Trusts.[28] However, the court did this without addressing the actual argument. Instead of addressing the issue of the Restatement following an evolving philosophy of law emboldening the right of marriage, the court simply distinguished the Restatement's example,[29] and claimed the Restatement of Trusts was inapposite because the "validity of a trust provision is not an issue," as the "distribution scheme was in the nature of a testamentary provision."[30]

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his present wife shall have died or been separated from him by absolute divorce," finding the provision to had a "natural tendency … to encourage divorce"); *In re* Estate of Gerbing, 337 N.E.2d 29 (Ill. 1975) (invalidating provision that terminated a trust in the event that the testator's son's wife predeceased him or they divorced, holding the testators intent to provide an incentive for divorce rather than support in case of divorce was void as against public policy, because the condition plainly "is capable of exerting such a disruptive influence upon an otherwise normally harmonious marriage").

[25] *Feinberg*, 235 Ill. 2d at 273 (citing *Gerbing*, 61 Ill. 2d at 508) (cleaned up).

[26] Shackelford v. Hall, 19 Ill. 211, 213 (1857) (upholding will where testator left estate to widow until remarriage and a remainder to his four children conditioned on their non-marriage before age twenty-one. The court held testators may "impose reasonable and prudent restrains upon the marriage of the objects of his bounty, by means of conditions precedent or subsequent, or by limitations." However, an impermissible restrain would be where a testator imposes "perpetual celibacy upon the objects of his bounty." Thus, holding that as a general rule testators may impose reasonable partial restraints on marriage).

[27] *Feinberg*, 235 Ill. 2d at 274.

[28] *Id.* at 279-82.

[29] *Id.* at 279-83.

[30] *Id.* at 279.

Fourth,[31] the court stated that *Shelley v. Kraemer*[32] did not apply because that holding has been, in its view, widely criticized for a finding of state action that was solely premised on the fact that a state court is a forum for a dispute.[33] Overall, the Illinois supreme court upheld the provision by holding in favor of a strong public policy of testamentary freedom and giving little weight to equal protection arguments and arguably without properly weighing the strong public policy against marriage restrictions.

However, the supreme court's ruling is unsatisfactory for two reasons. First, it does not address the judicial philosophy behind the Restatement's evolution in the realm of marriage. Second, it very arguably under weighs the strong public policy arguments against testamentary restrictions on marriage.

VI. TESTAMENTARY MARRIAGE RESTRICTIONS

[31] Oddly, the supreme court focuses on the appellate court's reasoning but omits apposite caselaw cited by the appellate court from other jurisdictions that support its holding upholding the provision. These cases are seemingly well-reasoned and would have bolstered the supreme court's opinion. *See*, Gordon v. Gordon, 124 N.E.2d 228 (Mass. 1955) (court adopting rule that partial restrains on marriage are considered valid unless found to be unreasonable, construing the rule to mean that "an inducement by way of gift to adopt or adhere to a particular religious belief is not a denial of religious freedom," and upholding a will that deemed the descendent children that marry outside the Jewish faith as deceased); *In re* Silverstein's Will, 155 N.Y.S.2d 598 (N.Y. Surr. Ct. 1956) (accepting the general rule that partial restrains on marriage do not violate public policy and upholding testamentary provision providing grandchildren's shares to be paid on the date of their marriage "provided they marry a person of Hebrew faith"); *In re* Estate of Keffalas, 233 A.2d 248 (Pa. 1967) (invalidating a testamentary provision giving $2,000 to each child so long as they marry a spouse of "true Greek blood and descent of Orthodox religion," and the same to any child that initially married non-Greek but divorced and remarried a person of Greek blood and Orthodox religion because this was found to be conducive to, and incentivizing of, divorce); Shapira v. Union National Bank, 39 Ohio Misc. 28 (Ohio Ct. Common Pleas 1974) (upholding a testamentary provision for son to receive only if he married a Jewish woman before or within 7 years after the testators death, finding partial restraints on marriage are reasonable and not contrary to public policy stating it was "not being asked to enforce any restriction upon Daniel Jacob Shapira's constitutional right to marry. Rather, this court is being asked to enforce the testator's restriction upon his son's inheritance").

[32] Shelley v. Kraemer, 334 U.S. 1 (1948) (holding that contracts violating the Fourteenth Amendment's due process clause by discriminating based on race will not be upheld or enforced by the judiciary).

[33] *Feinberg*, 235 Ill. 2d at 285.

Testamentary conditions restraining the living's marriage rights[34] have generally been granted reprieve from judicial enforcement.[35] Indeed, among the scant rules, testamentary freedom is an exception that general conditions in restraint of marriage are void.[36] Accordingly, general restraints[37] on marriage have consistently been struck down by courts in testamentary disposition.[38]

The prohibition on testamentary provisions restricting marriage or encouraging divorce[39] rests firmly on public policy. Specifically, the

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[34] The jurisprudence includes a variety of cases such as conditions prohibiting all marriage, prohibiting marriage at a particular time, and requiring or encouraging divorce. *See e.g*., Mahar v. O'Hara, 9 Ill. 424 (1847) (concerning prohibition on all marriage stating "there are many cases which show that an absolute prohibition of marriage will be disregarded"); Succession of Ruxton, 78 So.2d 183 (La. 1955) (concerning a prohibition of marriage at a particular time); *In re* Gerbing's Estate, 337 N.E.2d (Ill. 1975) (encouraging divorce).

[35] *See*, Scalise Jr., *supra* note 7.

[36] *Conditions, Conditional Limitations, or Contracts in Restraint of Marriage*, 122 A.L.R. 7 (1939); Watts v. Griffin, 137 N.C. 572 (1905) ("As a general rule the law will not recognize and enforce conditions in restraint of marriage"); Vaughn v. Lovejoy, 34 Ala. 437 (1859) ("Conditions operating unduly in restraint of marriage are utterly null and void because they are considered contrary to the common weal and good order of society"); Arthur v. Cole, 56 Md. 100 (Ct. App. 1881) (stating that authorities in England and the United States generally agree that bequests of personal property annexed on a condition subsequent in restraint of marriage are void).

[37] However, there are exceptions to the general rule, and partial restrains have been upheld on an ad hoc basis. Scalise Jr., *supra* note 7. Provisions for bequest if the descendant is not married at the time of death are not considered 'general restraints.' *See*, Succession of Ruxton, 78 So. 2d 183, 184 (La. 1955) (addressing the issue stating that condition did not prohibit marriage in the future "but rather [was] one that is conditioned upon [the beneficiary's] status at the time of the testator's death"). Also, restraints on remarriage have generally been held valid. *See*, *e.g*., *In re* 1942 Herald H. Lewis Trust, 652 P.2d 1106 (Colo. App. 1982).

[38] *See*, *e.g*., Watts v. Griffin, 137 N.C. 572 (1905) ("As a general rule the law will not recognize and enforce conditions in restraint of marriage"); Shackelford v. Hall, 19 Ill. 212 (1857) (absolute conditions in restraint of marriage are void as against public policy); Arthur v. Cole, 56 Md. 100 (Ct. App. 1880) (describing how the authorities, both in England and America, generally concur that if a gift or bequest is annexed on a condition subsequent in restraint of marriage that condition is void despite being a gift); *See also*, WILLIAM J. BOWE, PAGE ON THE LAW OF WILLS § 44.25 (Douglas H. Parker & Jeffery A. Schoenblum eds., 2005).

[39] Oddly, some older cases once upheld restrictions encouraging divorce. *See*, *e.g*., Born v. Horstmann, 22 P. 169 (Cal. 1889); Daboll v. Moon, 91 A. 646 (Conn. 1914) (upholding provision vesting upon death or divorce). However, the modern trend in law has been to hold such prohibitions as prohibited by public policy. *See*, *e.g*., Meade v. Pongonis, No. CV89 263416S, 1991 WL 132160 (Conn. Super. Ct. July 9, 1991) (overturning Daboll v. Moon).

exception's reasoning was drawn by weighing society's unyielding interest in the continuation of the race and its citizens, which leads to a cogent recognition that restraints on the freedom to form a lawful conjugal relationship are antithetical to that interest. This recognition requires legal protection of the freedom to choose one's own spouse.[40] Therefore, the

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[40] Maddox v. Maddox's Adm'r, 52 Va. 804, 806 (1854) ("It will not be questioned that marriages of a suitable and proper character, founded on the mutual affection of the parties, and made upon free choice, are of the greatest importance to the best interests of society, and should be by all proper means promoted and encouraged. The purity of the marriage relation and the happiness of the parties will, to a great extent, depend upon their suitableness the one for the other, and the entire freedom of choice which has led to their union; and upon these, in their turn, in a great degree must depend the successful rearing of their children, and the proper formation and development of their character and principles. Hence, not only should all positive prohibitions of marriage be rendered nugatory, but all unjust and improper restrictions upon it should be removed, and all undue influences in determining the choice of the parties should be carefully suppressed"); Sterling v. Sinnickson, 5 N.J.L. 756, 761 (1820) ("Marriage lies at the foundation, not only of individual happiness, but also of the prosperity, if not the very existence, of the social state; and the law, therefore, frowns upon, and removes out of the way, every rash and unreasonable restraint upon it, whether by way of penalty or inducement"); Williams v. Cowden, 13 Mo. 211, 213 (1850) ("The preservation of domestic happiness, the security of private virtue, and the rearing of families in habits of sound morality and filial obedience and reverence, are deemed to be objects too important to society to be weighed in the scale against individual or personal will"); White v. Equitable Nuptial Ben. Union, 76 Ala. 251, 259 (1884) ("Subject to modifications and limitations by the application of other special rules, dependent upon the facts, whether the condition be precedent or subsequent, or whether there is a gift over, or whether the property be real or personal, all conditions in deeds or wills, and all contracts, executory or executed, that create a general prohibition of marriage, are contrary to public policy, and to 'the common weal and good order of society.' The rule rests upon the proposition that the institution of marriage is the fundamental support of national and social life, and the promoter of individual and public morality and virtue; and that to secure well-assorted marriages, there must exist the utmost freedom of choice. Neither is it necessary there shall be positive prohibition. If the condition is of such nature and rigidity in its requirements as to operate as a probable prohibition, it is void. On the other hand, conditions in conveyances, or annexed to legacies and devises, in partial restraint of marriage, in respect to time or place or person, if reasonable in themselves, and do not materially and practically create an undue restraint upon the freedom of choice, are not void. Says Judge Story: 'But the same principles of public policy which annul such conditions when they tend to a general restraint of marriage will confirm and support them when they merely preserve such reasonable and prudent regulations and sureties as tend to protect the individual from those melancholy consequences to which an over-hasty, rash, or precipitate match would probably lead.' 1 Story, Eq. Jur. § 281.")

Illinois Supreme Court's ruling in *Feinberg* is incorrect because it weighed testamentary freedom more heavily than the public policy of marriage.

VII. ILLINOIS APPELLATE COURT DECISION IN *FEINBERG*

In fact, that is exactly what the Illinois Appellate Court held and reasoned in the lower *Feinberg* decision. Specifically, the appellate court acknowledged the longstanding rule that testamentary provisions which act as a restraint upon marriage or which encourage divorce are void because they violate public policy.[41] Besides citing caselaw that was later distinguished by the supreme court, the appellate court relied on The Restatement (Third) of Trusts.[42] The Restatement's view on the issue has progressed over time to now hold that a beneficiaries right to inherit that is conditional on, or terminates upon, marriage to a spouse of a particular religious belief are void because it goes against public policy as a restriction on marriage.[43] Following the Restatement's lead, the appellate court concluded the provision in *Feinberg* intended to influence the marriage decisions of the grandchildren and was therefore invalid because it seriously interfered with the descendant's right to wed a person of their own choosing.[44]

> While the appellate court's majority decision is compelling, the concurring opinion of Judge Quinn holds greater importance. First, Judge Quinn argues that courts will not enforce testamentary restraints violating the Fourteenth Amendment under the precedent of *Shelley v. Kraemer*.[45] In doing so the concurrence parries the argument that the "court is not being asked to enforce [a] restriction upon [the] constitutional right to marry" but rather is being asked "to

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[41] *In re* Estate of Feinberg, 383 Ill. App. 3d. 992, 994-95 (2008)

[42] *Id.*at 996.

[43] That example states: "*Family relationships*. A trust or a condition or other provision in the terms of a trust is ordinarily invalid if it tends to encourage disruption of a family relationship or to discourage formation or resumption of such a relationship. In addition, a trust provision is ordinarily invalid if it tends seriously to interfere with or inhibit the exercise of a beneficiary's freedom to obtain a divorce or the exercise of freedom to marry by limiting the beneficiary's selection of a spouse." *Feinberg*, 383 Ill. App. 3d at 996-97 (citing Restatement Third of Trusts § 29, Explanatory Notes, Comment *j*, Illustration 3, at 62-64 (3d ed. 2003)) (cleaned up).

[44] *Feinberg*, 383 Ill. App. 3d at 997.

[45] *Shelley*, 334 U.S. 1.

> enforce the testator's restriction upon his son's inheritance" as "a distinction without a difference."[46] The concurrence then explicitly adopts an evolving view of the law, particularly in the realm of marriage. Specifically, the concurrence frames the issue by stating: It is generally held in this country that partial restrains on marriage are valid unless unreasonable. While the Restatement (First) and (Second) of Trusts explained that restraints such as the instant "Jewish Clause" were once considered reasonable, the Restatement (Third) of Trusts now provides that they are no longer reasonable. While many jurists, notably the Justices of the United States Supreme Court who adhere to the principle of following the "original intent" of the framers of the constitution believe in a static jurisprudence, the authors of the Restatements do not. I believe the Restatement (Third) of Trusts § 29 (2003) is correct and I concur in affirming the circuit court's well-reasoned decision.[47]

Explicit originalist call-out in mind, it is significant that the Supreme Court has, for better or worse, harmonized with the tenor of the concurrence in its marriage jurisprudence, and has done so drastically since the *Feinberg* decision. In fact, recent Supreme Court precedents in conjunction with the general marriage exemption to testamentary freedom show the concurrence was very arguably correct that state courts should not enforce testamentary provisions that restrict a descendant's right to choose who to marry.

VIII. LIBERTY-BASED VIEW OF THE LAW AND CONSTITUTION

Before diving into those legal developments, it is important to outline the fundamental legal theory underlying the concurrence—a constitutional and legal philosophy principled on preserving the purpose of

[46] *Feinberg* 383 Ill. App. 3d at 995 (Quinn, J., concurring) (citing Shapira v. Union National Bank, 39 Ohio Misc. 28 (1974)).

[47] *Feinberg*, 383 Ill.App.3d*Id*. at 995 (Quinn, J., concurring) (cleaned up).

the law[48] and protecting individual liberty.[49] This theory is sometimes phrased as 'active liberty'[50] or a 'living constitution' and encompasses an adaptive view required for complex legal questions. As stated by Professor Ronald Dworkin, a thought-leader in the field, "judges must answer intractable, controversial, and profound questions of political morality that philosophers, statesmen, and citizens have debated for many centuries, with no prospect of agreement."[51] Thus, thorny judicial decision making is inevitable. In order to deal with this inevitability, judges and scholars have increasingly relied on a liberty-based constitutional and legal philosophy.

Liberty-based judges solve difficult inquiries by seeking the purpose of the law.[52] Language is read as the revelation of intents to be achieved by the law in question and a statute is framed "imaginatively in its setting [to] project the purposes which inspired it upon the concrete occasions which arise for their decision."[53] Justice Breyer aptly described that in employing the theory, "[a]lthough a judge cannot enforce whatever he thinks best," a judge must seek to "avoid being wooden, in uncritically resting on formulas, in assuming the familiar to be the necessary, in not realizing that any problem can be solved if only one principle is involved but that unfortunately all controversies of importance involve if not a conflict at least an interplay of

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[48] *See* Aharon Barak, *A Judge on Judging: The Role of the Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 28 (2002) ("The law regulates relationships between people. It prescribes patterns of behavior. It reflects values of society. The role of the judge is to understand the purpose of law in society and to help the law achieve its purpose").

[49] *See* STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 1-22 (New York: Alfred A. Knopf. 2004) (explaining that "The United States is a nation built upon principles of liberty" and arguing in two steps that first "the Constitution [is] centrally focused upon active liberty, upon the right of individuals to participate in democratic self-government" (p. 12) and second that this premise should serve as "a source of judicial authority and an interpretive aid" that "helps make sense of our Constitution's structure" and "can bring us closer to achieving the proper balance" between democratic authority and individual liberty (p. 5) and arguing judges should place greater emphasis on the "purposes" and "likely consequences" than on language, history, or tradition (p. 6)).

[50] The term "active liberty" is distinct from, but bears similarity to, the philosopher Isaiah Berlin's concept of "positive liberty." *See* ISAIAH BERLIN, *Two Concepts of Liberty, Inaugural Lecture Before the University of Oxford, in* FOUR ESSAYS ON LIBERTY 118, 118-72 (1969).

[51] Ronald Dworkin, *Unenumerated Rights: Whether and How* Roe *Should be Overruled, in* THE BILL OF RIGHTS IN THE MODERN STATE 381, 383 (Geoffrey R. Stone et al. eds., 1992).

[52] BREYER, *supra* note 49, at 18.

[53] BREYER, *supra* note 49, at 18.

principles." Overall, judges must view law in light of its purpose and consequences, including the contemporary social, industrial, and political conditions of the community to be affected in order to ascertain the meaning and proper application of the combating principles of a statute or law.[54]

The idea and theory of law itself in relation to marriage has evolved in America as judges and scholars have acknowledged the liberty-centric goals of the Constitution[55] and the institution's meaning in American society.[56] Although arguments against the wisdom[57] of this approach to the Constitution exist,[58] those arguments do not matter for this issue because that exact approach has already been applied cogently and specifically to the law of marriage by the Supreme Court.[59] Indeed, since the *Feinberg* decision, the Supreme Court has employed this approach when addressing complex

[54] BREYER, *supra* note 49 at 19-20.

[55] As early as 1891, the Supreme Court held no "right is more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others…" Union Pacific R. Co. v. Botsford, 141 U.S. 250, 251 (1891).

[56] *See*, e.g., Thurgood Marshal, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987) ("When the Founding Fathers used" the phrase "We the People," they "did not have in mind the majority of the country"); JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION, 11 (1996) (examining historical context of the framing and ratification of the Constitution to understand its interpretation).

[57] *See* Lochner v. New York, 198 U.S. 45 (1905) (Holmes, J., dissenting) (constitutionalizing "an economic theory which a large part of the county does not entertain" by invalidating state statutes for being interreferences with the rights of the individual and being and undue interference with liberty of person and freedom of contract); Dred Scott v. Sandford, 60 U.S. 393 (1857) (invalidating Missouri Compromise because it restricted the implied rights of slaveholders and asserting that "an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States … could hardly be dignified with the name due process of law", *Dred Scott,* 60 U.S. at 450).

[58] However, even ardent dissidents to the philosophical approach of a living constitution recognize there "is not serious dispute that, under [Supreme Court] precedents, the Constitution protects a right to marry and requires States to apply their marriage laws equally." Obergefell v. Hodges, 576 U.S. 644, 688 (2015) (Scalia, J., dissenting).

[59] *See* Obergefell v. Hodges, 576 U.S. 644 (2015); *see also* Loving v. Virginia, 388 U.S. 1 (1967) (constitutionally invalidating bans on interracial unions); Turner v. Safley, 482 U.S. 78 (1987) (holding prisoners could not be denied the right to marry).

person-liberty based questions like the right to marriage and abortion.[60] In doing so, the Court has ducked the old judicially wooden view of marriage and instead given weight to the evolving interplaying principles of individual-liberty and sacredness that have come to define the institution.

IX. *OBERGEFELL V. HODGES*

In *Obergefell v. Hodges*[61] the Supreme Court affirmed the right to marriage for same-sex couples is protected by the Due Process Clause of the Fourteenth Amendment.[62] The *Obergefell* Court stated "[t]he history of marriage is one of both continuity and change," and recognized how the institution "has evolved over time"[63] into a constitutionally protected, basic, sacred, and essential individual right to choose one's own partner.[64] In enumerating that evolution, the Court's reasoning focused on the interplay of four principles and traditions, which apply equally to all marriages—including those attacked by restrictive clauses.[65] First, "the right to personal choice regarding marriage is inherent in the concept of individual autonomy" and therefore decisions concerning marriage cannot be infringed by the state

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[60] *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S.Ct. 2791, 2805 (Blackmun, J., concurring) (reaffirmation of *Roe v. Wade*, based on the Due Process Clause of the Fourteenth Amendment's "realm of personal liberty which the government may not enter—a realm whose outer limits cannot be determined by interpretations of the Constitution that focus only on the specific practices of States at the time the Fourteenth Amendment was adopted" which was determined by the Court by inquiring into "the regulation's *purpose or effect*." Also, notably stating that people "do not lose their constitutional protected liberty when they marry. The Constitution protects all individuals … from the abuse of governmental power, even where that power is employed for the supposed benefit of a member of the individual's family." Thus, the Court reaffirmed "the fundamental right of privacy [that] protects citizens against governmental intrusion in such intimate family matters as procreation, childrearing, marriage, and contraceptive choice," and articulated "the principle that personal decisions that profoundly affect bodily integrity, identity, and destiny should be largely beyond the reach of government").

[61] Obergefell v. Hodges, 576 U.S. 644 (2015).

[62] *See* U.S. Const. Amend. XIV; *Obergefell*, 576 U.S. at 664.

[63] *Obergefell*, 576 U.S. at 659-60 (enumerating marriage's evolution to a voluntary contract between a man and a woman from the law of coverture).

[64] *Id.* at 656.

[65] *Id.* at 665 (stating "Choices about marriage shape an individual's destiny" and that "[t]his is true of all persons" and approvingly quoting *Loving v. Virginia*'s statement that "the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State").

for unconstitutional purposes.[66] Second, the right to marry is "fundamental because it supports a two-person union unlike any other in its importance to the committed individuals."[67] Third, marriage safeguards children and families, confers profound legal benefits, and affords permanency and stability for children.[68] Fourth, the Court cites several cases that show marriage is a keystone of American social order and therefore society and the courts must "support the couple, [by] offering symbolic recognition and material benefits to protect and nourish the union."[69] Those interplaying principles led the Court "to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person."[70]

Importantly, the *Obergefell* Court also acknowledged that although the Constitution requires democratic change for most policy, that only applies "so long as that process does not abridge fundamental rights" such as marriage.[71] Harms to fundamental rights are contrary to "[t]he idea of the Constitution" which withdrew those "subjects from the vicissitudes of political controversy, … and to establish them as legal principles to be applied by the courts."[72] *Obergefell* therefore commands that, when concerning fundamental rights such as marriage, the "dynamic of our constitutional system is that [the] individual need not await legislative action before asserting a fundamental right."[73] Thus, although at the time of *Feinberg* marriage was left entirely to state discretion,[74] *Obergefell* evolved the constitutional treatment of the institution into a judicially protected right of an individual's choice that is "inherent in the concept of liberty."[75]

X. *SHELLEY V. KRAEMER*

[66] *Obergefell*, 576 U.S. at 665-66.
[67] *Id*. at 666.
[68] *Id.* at 668.
[69] *Id*. at 670.
[70] *Id*. at 675.
[71] *Id.* at 677.
[72] *Obergefell,* 576 U.S. at 677 (quoting West Virginia Bd. Of Ed. v. Barnette, 319 U.S. 624, 638 (1943).
[73] *Obergefell*, 576 U.S. at 676.
[74] Irving Trust Co. v. Day, 314 U.S. 556, 562 (1942) ("Rights of Succession to property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance. Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction.").
[75] *Obergefell*, 576 U.S. at 665-66.

Obergefell is especially important when considered in conjunction with the Court's earlier holding in *Shelley v. Kraemer.*[76] There, the Court held that "state action in violation of the [Constitution's] provisions is equally repugnant to the constitutional commands whether directed by state statute or taken by a judicial official."[77] Importantly, the Court specifically reasoned that judicial enforcement of statutes and the common-law that result in denial of rights guaranteed by the Fourteenth Amendment was constitutionally prohibited.[78] For that reason, the Court constitutionally invalidated and prohibited judicial enforcement of race-based restrictive covenants.[79] Although the Illinois Supreme Court in *Feinberg*, like other courts,[80] denied this argument; it did so before *Obergefell* had been decided and only because it had previously "been reluctant to base a finding of state action on the mere fact that a state court is the forum for the dispute."[81] More importantly, most courts that have addressed the issue have done so from the perspective of religion, not the right to marry.[82]

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[76] Shelley v. Kraemer, 334 U.S. 1 (1948).

[77] *Id.* at 16.

[78] *Id.* at 17 (citing several sources showing courts cannot enforce policies violating freedom of speech, religion, and press).

[79] *Id.* at 16 (1948).

[80] Gordon v. Gordon, 332 Mass. 197, 208 (1955); *In re* Laning's Estate, 339 A.2d 520, 525 (1975); U.S. Nat. Bank of Portland v. Snodgrass, 202 Or. 530, 543 (1954) (en banc); Shapira v. Union Nat. Bank, 39 Ohio Misc. 28, 31 (1974).

[80] *See* Gordon v. Gordon, 332 Mass. 197, 208 (1955) (countering *Shelley* argument stating "There is no condition based on the religious belief of anyone at the time of marriage"); *In re* Laning's Estate, 339 A.2d 520, 525 (1975) (countering *Shelley* argument that "judicial enforcement of the religious condition in this case is [] the act of the state and forbidden by the Fourteenth Amendment" because enforcement of testamentary conditions "do not constitute a law respecting an establishment of religion"); U.S. Nat. Bank of Portland v. Snodgrass, 202 Or. 530, 543 (1954) (en banc) (countering *Shelley* argument based on "The First Amendment" prohibition on "Congress from making any law respecting the establishment of a religion.").

[81] *In re* Estate of Feinberg, 235 Ill.2d 256, 284 (2009). However, this argument is shaky. The First Amendment, for example, has been held to apply to private parties when those parties are engaged in activity deemed to be 'state action.' Cooper v. U.S. Postal Service, 577 F.3d 479 (2d Cir. 2009). In other words, when private action becomes imbued with a governmental character or when the government significantly insinuates itself into the operative activities of private parties, action by private parties has been held subject to all of the constitutional limitations on governmental action. Buckley v. American Federation of Television and Radio Artists, 496 F.2d 305 (2d Cir. 1974); Republican Party of Texas v. Dietz, 940 S.W.2d 86 (Tex. 1997).

[82] *Shelley*, 334 U.S. 1,

XI. *OBERGEFELL* AND *SHELLEY*

When considering those precedents together, the concurring appellate court opinion in *Feinberg* was likely correct.[83] The *Shelley* doctrine in conjunction with *Obergefell* very arguably commands courts as actors of the state to not administer probate in a way that violates "the right to personal choice regarding marriage [that] is inherent [with] the concept of individual autonomy."[84] And that command is logical. Certainly, state courts cannot enforce provisions that condition inheritance on violating the Constitution or benefits based on beneficiaries forgoing their rights. Indeed, courts have long invalidated restrictive clauses based on racial animus using that exact line of reasoning.[85] And the same has been held by courts faced with questions concerning trusts discriminating on the basis of gender and religion. [86] For example, one court faced with a gender and religious restriction in a trust held that where a "decision-making mechanism" is "so entwined with public institutions and government, discrimination becomes the policy statement and product of society itself and cannot stand against the strong enlightened language of our constitution."[87]

Additionally, the answers to apposite hypothetical questions are logically obvious. Undoubtedly, a court would not enforce a clause restricting marriage to a person of the opposite sex.[88] So too would clauses conditioning bequests upon the non-exercise of other constitutional rights,

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[83] *See In re* Estate of Feinberg, 383 Ill. App. 3d 992, 999 (2008) (Quinn, J. concurring).

[84] *Obergefell*, 576 U.S. at 665-66.

[85] *See* Connecticut Bank & Tr. Co. v. Cyril & Julia C. Johnson Memo'l Hosp., 30 Conn. Supp. 1, 294 A.2d 586 (Super. Ct. 1972) (clause restricting use of bequeathed private hospital room to patients of the Caucasian race invalidated because the judiciary must not be seen as an instrument of injustice and so, courts refuse to give effect to such provisions); *see also* Sweet Briar Inst. V. Button, 280 F. Supp. 312, 317 (W.D. Va. 1967) (issuing injunction where college brought an action to enjoin enforcement of direction in a will setting up a trust to establish and maintain education of "white girls and young women"); *see also* La Fond v. Detroit, 357 Mich. 362 (1959) (voiding testamentary bequest to city of Detroit where funds were for the purpose of providing playfield for "white children" since carrying it out would be contrary to the laws of the United States).

[86] *In re* Certain Scholarship Funds, 575 A.2d 1325 (N.H. 1990) (upholding invocation of cy-pres doctrine to reform terms of educational trust discriminating on basis of gender and religion).

[87] *In re* Certain Scholarship Funds, 575 A.2d 1325 (N.H. 1990).

[88] *Cf. Obergefell*, 576 U.S. 644.

such as requiring a recipient to take the stand at their own trial or to not participate in suffrage, be facially invalid because holding otherwise would allow testators to use judicial functions to leverage individuals away from exercising their constitution rights. Finally, as stated above, marriage has *historically* been protected from restrictive clauses. Thus, a refusal by courts to uphold provisions restricting the constitutional rights of beneficiaries would merely be reaffirming and solidifying a long-standing doctrine reasoned by genuine and weighty public policy considerations.

Lastly, the four principles and traditions enumerated in *Obergefell* invalidating marriage discrimination for same-sex couples apply with equal force to a judge administering probate or a trust. First, the right to personal choice regarding marriage is equally violated by a judge upholding a discriminatory testation as a judge refusing recognition of a same-sex couple.[89] The "abiding connection between marriage and liberty" is the reason why the Court "invalidated interracial marriage bans"[90] and applies equally "to the decision to enter [a] relationship"[91] regardless of whether that person is being administered probate by the courts.[92] Judicial endorsement of any marriage restriction, even a restriction against a single individual, could effectively destroy the entirety of an individual's right if the object of that person's affections is the prohibited person. Thus, all judicial enforcement of marriage restrictions, large or small, have an identical effect on the right to choose one's own partner.

Second, marriage is equally fundamental to supporting the unions of devisees as it is same-sex couples, and devisees should not lose their right to governmental recognition because they are receiving postmortem gifts. Governmental endorsement and recognition of a descendant's marriage would be harmed by allowing judicially enforced "exclusion from that status," and would be equally injured as same-sex couples by state judges

[89] *Obergefell*, 576 U.S. at 665-66 (Constitutionally prohibiting state laws discriminating against same-sex marriage. Stating "Choices about marriage shape an individual's destiny" and that "[t]his is true of all persons" and approvingly quoting *Loving v. Virginia*'s statement that "the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State").

[90] *Obergefell*, 576 U.S. at 666 (citing Loving v Virginia, 388 U.S. 1, 12 (1967)); *see also* Zablocki v. Redhail, 434 U.S. 374, 384 (1978) (observing *Loving* held "the right to marry is of fundamental importance for all individuals").

[91] Zablocki v. Redhail, 434 U.S. 374, 386 (1978).

[92] *See* Shelley v. Kraemer, 334 U.S. 1, 16 (1948); Connecticut Bank & Tr. Co. v. Cyril & Julia C. Johnson Memo'l Hosp., 30 Conn. Supp. 1, 294 A.2d 586 (Super. Ct. 1972); Loving v. Virginia, 388 U.S. 1 (1967).

coalescing as cogs "to lock them out of a central institution of the Nation's society," with an individual of their choice.[93] Just as "outlaw to outcast" does not "achieve the full promise of liberty" guaranteed by the constitution, that end would be equally unachieved by judicial endorsement through enforcement of testamentary conditions demeaning that promise.[94]

Third, beneficiaries are entitled to the same legal status recognition, and their children to the same benefits of marriage, as any other couple endowed with the right to choose their own partner.[95] Devisee's "right to marry, establish a home and bring up children is a central part of the liberty protected by the Due Process Clause"[96] and therefore deserves "recognition and legal structure"[97] that should not be judicially disgruntled by the probate process. Although allowing a testator to impact a devisee's desired family structure through a testamentary gift seems like a carrot from the testator, it simultaneously employs the courts as a stick against the devisee. Thus, refused administration based on a beneficiary's rejection of a testator's intent to violate a devisee's constitutional rights would be judicial coalescence in that act; ergo, equally violating the purpose and principles of promoting families that underlie the institution. Thus, the judiciary very arguably ought to establish a principle of non-interference in probate administration.

Fourth, marriage does not lose its status as a keystone of our social order upon testation.[98] Courts should heavily weigh the underlying purpose and principle of marriage as "the foundation of the family and of society"[99] which "as an institution has evolved in substantial ways over time, superseding rules related to parental consent, gender, and race once thought by many to be essential."[100] To uphold marriage as keystone of freedom, courts should therefore seek to "support the couple" by granting "symbolic recognition and material *benefits* to *protect and nourish the union*."[101] Among these benefits should be a reaffirmation and strengthening of the principle that courts will not be employed to enforce testamentary conditions restraining marriage. Indeed, the principle—being an appearance of state

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[93] *Obergefell*, 576 U.S. at 670.
[94] *Id.* at 667; *Loving*, 539 U.S. at 567.
[95] *Obergefell*, 576 U.S. at 668.
[96] *Id*. at 668 (citing *Zablocki*¸434 U.S. at 384).
[97] *Id*.
[98] *Id.* at 670.
[99] Maynard v. Hill, 125 U.S. 190, 211 (1888).
[100] *Obergefell*, 576 U.S. at 669 (citing N. Cott, Public Vows).
[101] *Obergefell*, 576 U.S. at 670 (emphasis added).

endorsement and protections—behind the symbolic and material benefits afforded to protect and nourish the right to choose one's own partner would be eviscerated if courts continued to allow themselves to be employed as a control mechanism through administration of benefits that attack that right. Again, this arguably commands the judiciary to establish a principle of non-interference in probate administration.

XII. CONCLUSION

In retrospect, the appellate court's opinion in *Feinberg* was very arguably correct. A court pledged to uphold the Constitution[102] that enforces a restriction upon an individual's right to marriage, and a court enforcing a testator's restriction on a devisee's inheritance that does the same thing, is a distinction without a difference.[103] The very nature of marriage is that any restriction, even of one person, could effectually eliminate the entire pool and strip an individual of their right to choose their partner. It is not the court's role to govern the objects of people's affections. Rather, it is their duty to ensure "equal dignity in the eyes of the law," by ensuring the "ideals of love, fidelity, devotion, sacrifice, and family,"[104] are recognized through judicial protection of the constitutional right to marriage. The strong principles and purposes for judicially protecting marriage have been solidified by the Supreme Court, and state courts should look to those principles when evaluating how to rule in situations where they are employed to enforce testamentary restrictions that attack the institution. Because testamentary marriage restrictions historically were held to be against public policy, have been rejected in the realm of race and gender, and would logically be unenforced if replaced by analogous constitutional rights, and in light of the principles and purposes behind the Supreme Court's recent strengthening of the constitutional right to marriage, state courts should follow suit and establish a principle of refusing to enforce testamentary provisions in restraint of marriage.

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[102] U.S. Const. Art. VI, Cl. 2 ("The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding").

[103] *In re* Estate of Feinberg, 383 Ill. App. 3d 992, 999 (Quinn, J., concurring).

[104] *Obergefell*, 576 U.S. at 681.